Quid Novi

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LUS ASSEMBLY

McGILL FOR JURISTS, BAR SCHOOL FOR LAWYERS ?

BY PETER DAUPHINEE

About 80 students showed up at last Thursday's general assembly to discuss and plan a response to a proposal which would do away with bar school and exams.

Following an outline by Marek Nitoslawski, L.U.S. V.P.(Civil), of the Avis published by the Office des professions, a number of questions and comments from the audience were aired.

The Office, a government office established under the Code des Professions as a "watchdog" over 39 professions and their governing corporations in the province, will probably recommend to the Minister of Education that exams and courses given by the professional corporations be abolished. These are viewed as duplicative, largely unnecessary and expensive. On the other hand, argues the Avis if there is any useful content to these programs, their proper place is the University.

The Office des professions will propose to the Minister, therefore, that the useful and educational parts of these supplementary conditions become the responsibilty of the professional schools offering these programs.

For Law this could mean (1) total abolition of Bar curriculum and exams at one unlikely extreme, (2) annexation of an extra year of studies containing that curriculum to the present university program at the other, or (3) more likely, some sort of integration of the Bar program with the university curriculum. It is unknown what will happen because the plan of the Office's Avis apparently involves an extremely open-ended method of "repatriating" or "reintegrating" the "extra" material, if any. The Bar shall meet with each law faculty and attempt to "negotiate" a law curriculum acceptable to both. In the event they fail to agree, the Minister of Education will intervene to impose a compromise.

Professional corporations could continue to administer a stage, but only insofar as it is not part of the basic education of the profession. Rather it would be strictly an initiation with the profession and would be administered more strictly and uniformly than at present. Aspects of stages closely related to he academic program would become part of the university course, in the same way as suppiementary courses and exams.

Nitoslawski pointed out that there may be danger in "lumping law with other professions" in that most of the other professions involve a very technical and scientific education, whereas producing a good lawyer arguably involves exposure to a broader, more "liberal arts" education. From this perspective, the present system works quite well; university produces the theoretical background to produce jurists, while Bar school functions to channel this "learning" into useful practice. If one of these aspects of legal training has to be sacrificed in the name of pragmatism, and in the face of government cost cutting, it will undoubtedly be that which produces jurists rather than that designed for practitioners.

Nitoslawski pointed out that

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Eisenberg on Contracts

BY DANIEL GOGEK LLBI
AND RICHARD JANDA LLBI

"What should a system of contract look like?" This was the broad question Prof. M. Eisenberg of the University of California at Berkeley posed to students in his recent lecture at the Faculty of Law. As part of his investigation of this question, Prof. Eisenberg focussed on the problem: "When can a court review a contract, even if the bargainer knew exactly what he was getting into? In particular, what are the limits within which one can apply a stict principle against reviewing the contract? The object was to identify a scheme of analysis courts could use to determine when to depart form the bargain.

The doctrine of consideration has traditionally been based on a bargain theory. This notion is put succintly in the American Restatement (2nd) of Contract: "s. 75(1) To constitute consideration, a performance or return promise must be bargained for." However, given the exceptions to the application of this doctrine, including the fact of judicial review of contracts bargained for, Prof. Eisenberg suggested that one might adopt a more comprehensive doctrine of consideration that would embrace all those "clusters of elements" determining what contacts the law should enforce.

A bargain is an exchange in which each party views his performance of a promise as the "price paid" for the performance of the other half of the bargain. For contracts which fall into this category, it is a general rule that courts will not look into the adequacy of consideration.

Eisenberg identified four grounds on which one could uphold the bargain theory's refusal to admit review of the adequacy of consideration. First, there is no "just price", there is only an "agreed-to price". Second, even if it were possible to determine an objective value for the terms of exchange, there is no reason why it should take precedence over the subjective values the parties place in the agreement. Third, we do not know that there would have been performance for a lesser price. Fourth,

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DISARMAMENT: Should we march in the streets ?

By Richard Janda

The International Law Society presented a seminar on "The Arms Race-- Medical Consequences-Legal Controls", as part of Disarmament Week at the University. Needless to say, the two speakers who made presentations, Prof. Ivan Vlasic of our faculty and Prof. Don Bates of McGill's faculty of Medicine, painted a gloomy picture of fraudulent and dangerous international political practise and devastating human consequences for failure to prevent the use of nuclear weapons.

For his part, Prof. Vlasic set out to expose the virtual impotence of presently existing international treaties and conventions and the systematic failure of nuclear powers to show any real movement toward arms control.

Prof. Vlasic began by reviewing the history of arms talks since the First World War. Even though the League of Nations covenant contained a solemn pledge to the maintenance of the lowest level of weapons, even though the Kellogg-Briand Pact contained a renunciation of arms and war, and even though there was a general disarmament conference in 1932 which discussed far-reaching proposals for general complete disarmament and international policing, war broke out not two years after the 1932 conference dissolved in 1937.

After the death of 50 million people and the first use of atomic weapons, the U.N. Charter set out to establish a system of collective security with its over-riding goal of saving the world from future war. "Following countless conferences on disarmament, what has been accomplished?" Prof. Vlasic invited us to ask. The answer to that was "little if anything".

The most important treaty, the Non-proliferation treaty of 1968, to which there are over 100 parties, is perhaps the single success. But even here, renunciation of the acquisition of nuclear weapons was undertaken by the parties in exchange for a pledge by the nuclear powers to work toward disarmament. Prof. Vlasic speculated that continued non-compliance with terms of the treaty giving preferential treatment to signatories in the supply of nuclear energy for non-military purposes (Argentina, a non-signatory, received a nuclear station) may cause the treaty to dissolve.

Already, the nuclear "club" has grown to India, Israel and perhaps Pakistan, South Africa and Argentina. This expansion increases the likelihood of the use of nuclear weapons especially in light of looser control exercised by these new nuclear powers over their systems.

Apart from the Non-proliferation treaty, other treaties had marginal effects on the arms race and in some cases amounted to legalistic fraud. For example, with much fanfare, a treaty banning "radiological weapons" was concluded by the super-powers. The only problem was that this class of weapons comprised all radiation weapons excluding nuclear weapons- i.e. a non-existent class. Similar treaties were concluded on the Moon, the Sea Beds, and Environmental Weapons- all non-existent areas of military planning. So a tremendous amount of time was spent negotiating nothing.

Such treaties, Vlasic suggested, were only meant to take the heat off negotiating real arms control. Instead, not a single weapon has been dismantled or banned and the armaments industry is experiencing unprecedented prosperity as the fastest growing industry in the world.

The consequences of use of nuclear weapons were graphically outlined by Prof. Bates. He asked his audience the question, "what would happen if a nuclear bomb were dropped on Montreal?" The extent of destruction would, of course, be beyond imagining, and the litany of various kinds of death and the vast area over which it would be spread only served to reinforce that. Dr. Bates wished to emphasize first, that Montreal was a highly likely target on simple statistical grounds, and second that there was no sense to the notion of victory after a nuclear attack. "Civilization as we know it would be destroyed".

Profs. Vlasic and Bates shared the conviction that "informing" the public of this predicament would somehow stir public opinion into action. The question on some students' minds, especially in light of the recent wave of student protest in Europe, was what such action means. Everyone shares the sense that nuclear war is a horror. Is it enough to protest against horror? What kinds of concrete steps in international negotiation should be pushed for? Prof. Vlasic suggested that if he had an answer to such a question he could solve the world's problems. But unless we are clear about what concrete policies to adopt beyond unilateral disarmament (which both Bates and Vlasic suggested had to be replaced by more sophisticated arguments), will marching in the streets do anything but vent frustration? ■

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McGill may be particularly vulnerable to the Office's proposal as it attempts to offer a broad education in the law, in contast to other schools, notably Sherbrooke and Montreal which orient their courses toward the Bar. The result of any attempt to integrate the Bar curriculum into the McGill curriculum would almost certainly result in a much more limited choice of electives and by that fact, among others, would probably mean the end of the National Program.

Furthermore, the possibility of Ministerial intervention in the process of determining the curriculum, which, it seems, could be exercised any time the Bar complained about a university's program, could have potentially grave consequences for the principle of academic independence.

Nitoslawski finished his resumé of the situation with an invitation to interested students to help him in drawing up a brief which will be presented to the Office in December, followed by public hearings in March. Help was also requested to organize a symposium on this matter to which all interested parties are being invited to send representations. It seems likely that the Office at least, will be represented, as will the Ministry of Education, the Bar, and the Faculty, who have been invited to send representations.

Additional points came to light during the subsequent question period. Since the Office will only produce recommendations for the Minister of Education after the public hearing in March, legislation is probably 1½ or 2 years away.

In discussing the likelihood that the proposal would result in an extra year for law students in Quebec, it was pointed out that this would result in additional cost to the universities. The government currently spends 1½ to 2 million dollars to subsidize Bar school but it is by no means clear

that this money could find its way to the universities, or even if so, to the law faculties. In fact, as Ted Claxton pointed out, it is well known in official circles that the current plan is motivated, at least partly, as a money saving move. More money for the universities, and thus an extra year of law school, is unlikely

Some arguments in favour of the plan were advanced, but furthur discussion revealed them to be based on crucial ambiguities in the Office's proposal. For example, Luc Drouin argued that under the pressure of having to prepare for Bar school, students currently must tailor their choice of courses to suit the Bar, and thus electives such as a social law course are largely ignored. Removing the necessity of preparing for the Bar school, students - and law faculties - would be more free to decide what type of law is socially important.

But, as Richard Janda pointed out, arguments to support theories of greater or lesser university autonomy depend entirely on what mechanism, if any is set up for negotiations between the Bar and the universities. And, as Nitoslawski concluded, "a mechanism must be defined which will guarantee autonomy. Then abolish Bar School".

Nitoslawski also pointed out that this move, insofar as it applies to law, can be seen as an attack on the power of the Bar, which, 7 or 8 years ago was criticized as limiting access to the profession by imposing failure rates on Bar exams of up to 60%. Yet, according to Claxton, "the reorganization of the system has already been carried out. The government is adding another step. Leaving to the Minister of Education a discretion to intervene is an unprecedented idea which universities should fight."

The strongest support for the present system, especially as found at McGill, came from two students who already completed Bar school. Responding to a question as to whether Bar school is really necessary, Nancy Boillat replied that there was really nothing redundant about Bar school: it teaches the practical and procedural aspects of the law which are not extensively covered at McGill. Pierre Lefevre, a graduate of University of Montréal Faculty as well as Bar School, was critical of schools such as Montréal and Sherbrooke where "teachers are too preccupied with results attained in Bar school". He warned law students "not to be too practical in uni-- versity, as you get all you need in Bar school". Here we should study "other systems and approaches" and "learn to be jurists". ■

L U S

HATS

The Law Undergraduate Society has roughly five hundred members. In a recent count I discovered that the School relies on this small body to man more than one hundred and sixty service positions. This list excludes, of course, interest groups. It includes students who, among many other things, run two accredited courses, publish casebooks, provide a legal information service, put out a Law Journal and do much of the work in Faculty Council Committees. It is a load unequalled by any other school in Canada. Were the students just students, this Faculty would fall in a heap academically, administratively and financially. Our community is a truly cooperative one and nothing could be finer to my mind. Ours is a living example of the "collegiality" one hears so much of these days.

And nothing could be more timely. We face common problems, some of enormous dimensions. They range from local ones such as getting Senate to act on Faculty Council resolutions (e.g. the new degree requirements and the B.S.A. program) and expanding our Legal Clinic resources, to the big ones such as the repatriation proposals of L'Office des professions and the funding cutbacks. In dealing with these we are facing problems that require us to transcend our old student/Faculty dialectic. It has been the policy of this L.U.S. administration to seek consensus and to take the initiative in pursuing common goals.

One of the most important tasks of any L.U.S. executive is to ensure continuity. When a body as fluid as ours undertakes as much as we do, we have seriously to ask ourselves how we can maintain our level of participation and coherence from year to year. One easy answer appears before you right now: Quid Novi borrows from the stable models of the Moot Court Board, the Journal and the Bookstore to provide some sort of collective memory. We can also redesign our own constitution to provide better transition structures, to spread the process of decision-making more broadly so that experience can be spread with it, and to create closer ties with other decision-making bodies that affect us. Our Structural Revision Committee is presently addressing these issues and students will be asked to vote on its recommendations at the end of the year.

Even the casual observer of the L.U.S. will note that over the last few years (indeed since it "woke up") a third mechanism has been in use: the student/Faculty dialectic. This method is guaranteed effective for continuity, if not for coherence. Nothing draws a crowd (or candidates!) like a fight. Once engaged, the process is everything. "Winning" is almost irrelevant. This is not a cynical analysis: it is realistic. Indeed, the scenario is hard to avoid, given that the personalities and beliefs of individual students are thrown into relief by their isolation on Faculty Council. The costs of this system are high.

A fourth mechanism would be a more realistic integration of students into Faculty Council. It only stands to reason that representation reflect participation and responsibility. Only this way can continuity and coherence really be achieved. Only this way can we avoid "ghetto-izing" student participation on Council. And only this way can we maintain our trascendence of the old dialectic. It's a question of hats.

Surely, for collegiality to work it must be manifest at all levels. I sit front-row-centre watching the good will and energy of students working for the benefit of our community and frankly we have a good thing going. This is a resource that budget cuts cannot touch. We can keep programs that others will lose.

The L.U.S., by Senate regulation, can neither propose nor vote on such an increase. Only staff can, and I sincerely hope they do.

CAMPBELL STUART
PRESIDENT

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in the interest of promoting commercial exchanges, bargains should be predictably enforceable. However, Prof. Eisenberg went on to say that although these arguments for the strict application of bargain theory "are weighty, they are not complete." First, objective values are frequently determined by the courts. Second, in the model situation of half-completed contracts, one party (the party who performed) has a stake in maintaining the promised value of the contract while the other disputes that value. Third, if a bargain is set in an unfair manner, it is not unfair to judicially review it. Fourth, not all bargains are commercial and involve credit or planning.

Given that such counter-arguments reveal limits to he strict application of the bargain theory, it should not be surprising that courts have evolved a principle of unconscionability to review contracts. However, Prof. Eisenberg noted that the rules of unconscionability are "not clear". Courts have generally invoked unconscionability in reviewing whether parties were fully aware of the exact terms of exchange and, in particular, whether there was improper bargaining conduct, such as unfair surprise. A lack of clarity exists as to whether courts may extend the principle of unconscionability to permit the review of the terms of exchange even where the parties were fully aware of them. Given that there are unfair terms of exchange and a consequent need for courts to review such contracts, Eisenberg stressed that the courts must have a more precise doctrine within which to frame their decisions. The doctrine he suggested was one in which review would depend on the nature of the market within which the contract was made. The theory first considers the half-completed contract in the perfectly competitive market. This situation does not justify judicial review of the terms of exchange since this is an efficient market in which the price is fixed clearly by market forces and there is no other reasonable price that could have been contracted for.

The bargain principle must yield to review of the terms of exchange when the conditions of the perfect market are departed from. In particular, when perfect market conditions are "relaxed" with the creation of a monopoly, for example, although the bargain theory will not always give way, it can give way to review under a doctrine of distress. "Distress" means that a party, in a state of necessity, makes a contract on any terms available, and that the other party wrongfully takes advantage of this situation of necessity. Eisenberg suggested that one could draw on the analogy of salvage cases in admiralty law in which bargains are reviewed by drawing upon unjust enrichment notions and by determining whether skill and diligence were employed. However, the doctrine of distress takes as its point of departure the discovery of a monopoly market situation only after which a test like that of salvage cases can be applied to determine the extent of enforcement of the contract.

At the conclusion of the lecture, several students and professors joined Prof. Eisenberg in a fruitful discussion of the ideas expounded in the lecture.

Prof. Crépeau asked Eisenberg whether the doctrine of consideration was moving in a general direction toward the civilian doctrine of consent. Although he confessed that he was not an expert in the civil law of Quebec, Prof. Eisenberg commented that the observation was a possible one. He reiterated the example of the German Civil Code (Article 132) which enables a court to review contracts which, despite clearly being consensual agreements, have been made under circumstances such as duress. Prof. Crépeau then conjectured that the doctrine of consideration might eventually be supplanted by something quite similar to the doctrine of co nsent. Prof. Eisenberg suggested that while that might occur, there remained the task of enunciating the specific circumstances under which a contract, though prima facie a "bargain", could be reviewed by the court.

Prof. Thomas Hadden of the Institute of Comparative Law then raised his objections to the use of neoclassical economic market analysis to establish one of the elements that would be used to determine when the contract would be subject to review. "There are many of us who do not believe that this kind of analysis can achieve the desired result."

Holger Seibert, a graduate student of the Institute and a civil law graduate from the University of Freiberg, shared similar objections to the use of market tools of analysis. Seibert offered further examples from the German Civil Code that specify the various situations in which consensual agreements could be reviewed and ultimately held void. According to Seibert, there is no need for market analysis.

From a completely different perspective, some students questioned the proposed scheme of analysis on the grounds that it might lead a court to treat the contract of the unregulated monopolist seller as being subject to judicial review. The objection was that one should not consider monopolies as necessarily producing inefficient market situations.

To this Prof. Eisenberg replied with a reminder that his distress principle took account of whether monopolies were produced by skill and diligence. Also, his work involves other areas being developed in addition to the doctrine of distress, in which market factors would also play an important role.

(special thanks to Prof. Simmonds)